

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT P. CRAIN and U.S. POSTAL SERVICE,
MAIN POST OFFICE, Charlotte, NC

*Docket No. 03-2059; Submitted on the Record;
Issued November 12, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for reconsideration on the grounds that it was not timely filed and failed to demonstrate clear evidence of error.

On September 16, 1991 appellant, then a 44-year-old custodian, filed a notice of traumatic injury alleging that on August 24, 1991 he inhaled dust at work when he was exposed to construction and developed sarcoidosis.

On November 12, 1991 the Office accepted the incident that appellant inhaled dust at work.

By report dated July 29, 1992, appellant's attending physician and Board-certified internist, Dr. Scott A. Kremers, diagnosed appellant with sarcoidosis and stated that the inhalation of dust at work caused a temporary aggravation of appellant's symptoms, but that he was asymptomatic from a respiratory standpoint and had returned to his baseline status by December 1991. He noted that appellant's exposure to dust caused an exaggerated cough response due to his underlying sarcoidosis.

By decision dated September 15, 1992, the Office accepted that appellant sustained a temporary aggravation of the symptoms of sarcoidosis but denied any causal relationship after December 1991 based upon Dr. Kremers' report.

By letter dated October 12, 1992, appellant requested an oral hearing. He claimed that he was still under his physician's care for his condition and believed that the Office should pay his continuing medical bills.

By letter dated March 1, 1994, the Office informed appellant that he abandoned his request for a hearing since he failed to appear for the oral hearing on February 7, 1994 and did not request cancellation at least three calendar days prior to the scheduled hearing.¹

By letter dated February 21, 2003, appellant requested that the Office reopen his claim based on the medical evidence he submitted on January 23, 2003.² He submitted an October 4, 1991 surgical pathology report, an October 1, 1991 diagnostic report, medical reports dated August 30 to October 17, 1991, a report from Dr. Kremers dated November 15, 1991, a memorandum from Tom Bryson dated January 27, 1992, a memorandum from John Lillis dated November 29, 1992, a diagnostic test dated March 5, 1992, a duty status report from Dr. Kremers dated February 22, 1993, a memorandum from Stanley Chalmers dated August 11, 1999, a copy of appellant's request for reopening his claim dated November 6, 1999, a letter from a Board-certified internist Dr. Peter Loper, dated August 25, 2000, a letter from Board-certified family practitioner Dr. Steven P. Bonner, dated December 14, 2000, a letter from Dr. Loper dated October 10, 2001, and diagnostic tests dated June 19, July 8 and August 19, 2002.

By decision dated June 30, 2003, the Office determined that appellant's February 21, 2003 request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.³ As appellant filed his appeal with the Board on August 19, 2003, the only decision properly before the Board is the June 30, 2003 Office decision denying appellant's request for reconsideration.

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.⁴ Appellant's letter dated February 21, 2003 was filed more than one year after the date of the last merit decision issued on September 15, 1992 and, therefore, his request for reconsideration was untimely. The Office will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error by the Office in its most recent merit decision.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁵ The evidence must be positive, precise and explicit and must

¹ There is a decision of record dated March 3, 1999 but this is regarding a different claim; appellant submitted a copy of this decision with his request for reconsideration.

² Appellant also requested that the Office reconsider his claim regarding a schedule award, however, the Office did not render a decision on this issue.

³ *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

⁴ 20 C.F.R. § 10.607(a).

⁵ *Dean D. Beets*, 43 ECAB 1153 (1992).

be manifest on its face that the Office committed an error.⁶ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.⁷ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁸ This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.⁹ The application must establish, on its face, that such decision was erroneous.¹⁰

In this case, the Office accepted that appellant inhaled dust at work on August 24, 1991 and sustained a temporary aggravation of his preexisting sarcoidosis condition, which according to his treating physician Dr. Kremers, ceased by December 1991. Based on Dr. Kremer's report, the Office, in its September 15, 1992 decision, denied appellant's claim for compensation after December 1991 as the medical evidence failed to establish a causal relationship to appellant's employment after this date. Appellant contends that he continued to suffer from the condition after December 1991 and sought medical treatment.

As appellant's request for reconsideration was untimely, it is appellant's burden to submit evidence to establish clear evidence of error on the part of the Office in their last merit decision. In support of his request, appellant submitted new medical evidence; however, the evidence does not establish that the Office committed clear error in denying his claim after December 1991.

In an August 25, 2000 report, Dr. Loper indicated that appellant continued to have "intermittently steroid-dependent airway hyperactivity" and would need to be restricted from certain types of work. He stated: "It is impossible for me to ascribe a degree of disability to [appellant] at any given time because of the reversible, intermittent nature of his problem." Even though Dr. Loper indicated that appellant continued to have intermittent breathing problems at the time of his report, the physician did not attribute appellant's continuing condition to the accepted exposure to dust in 1991. This does not establish that the Office committed clear error in denying appellant's claim after 1991.

In a report dated October 10, 2001, Dr. Loper indicated that appellant continued to have intermittent dyspnea and episodes of coughing secondary primarily to his bronchial hyperactivity which, he believed was a consequence of his sarcoidosis. Although appellant continued to have respiratory problems after December 1991, this evidence does not explain how appellant's condition was caused or aggravated by his accepted exposure. The medical report does not establish that the Office committed error in finding that the aggravation of appellant's condition caused by his employment exposure was temporary in nature and ceased by December 1991.

⁶ *Leona N. Travis*, 43 ECAB 227 (1991).

⁷ *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁸ *Leona N. Travis*, *supra* note 6.

⁹ *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁰ 20 C.F.R. § 10.607(b); *see Thankamma Mathews*, 44 ECAB 765 (1993); *Jesus D. Sanchez*, *supra* note 7.

Dr. Loper does not explain how appellant's continuing respiratory problems are related to the 1991 incident.

Dr. Loper's attending physician's report dated October 22, 2002, diagnosed sarcoidosis but checked "no" that the condition was not caused or aggravated by an employment activity. This report clearly does not support causal relation and does not establish clear evidence of error by the Office in rejecting appellant's claim after December 1991.

In a December 14, 2000 report, Dr. Bonner stated that appellant was totally disabled and unemployable and diagnosed sarcoidosis. Dr. Bonner's report is deficient as the physician did not provide an opinion explaining how the diagnosis made in December 2000 was causally related to appellant's December 1991 exposure. As such, this report is not sufficient to establish clear evidence of error.

As appellant's February 21, 2003 request for reconsideration was untimely filed and failed to demonstrate clear evidence of error, the Office of Workers' Compensation Programs properly denied his request for reconsideration. The June 30, 2003 decision of the Office is hereby affirmed.

Dated, Washington, DC
November 12, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member